IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.657 OF 2018

Doshi Brothers
Proprietary Concern carrying on its
business and having its address at
56/A2, Tara Niwas, 1st Floor, Block No.5,
Sarojini Road, Vile Parle (W),
Mumbai -56.
Through its Proprietor,
Mr. Bhupatrai Chimanlal Doshi
r/o Vile Parle, Mumbai ….Appellant

v/s.

1) The State of Maharashtra

2) M/s. Sai Wire Products Pvt. Ltd.
Company incorporated under provisions
of Companies Act 1956, carrying on its
business at Manisha Industrial Estate,
Palghar-Boisar Road, Char Rasta,
Near Anand Ashram School,
Palghar (W) 401404.

AND

also carrying on its business at
19, Taiyabi House, Room No.201,
1st Cooper Lane, Mumbai 400 003.

3) Mustafa Mohammadihusain Sial
Director and Authorised Signatory of
M/s. Sial Wire Products Pvt. Ltd.

i.e. Respondent No.2 having his address
at 19, Taiyabi House, Room No.201,
1st Cooper Lane, Mumbai 400 003.

And

Saifee Burhani Park, Building No.2A,
Flat No.1810, 18th Floor,
New Hind Mill Mhada Colony,
Mazgaon, Ghodapdeo,
Mumbai 400 010. ...Respondents

Mr. Jatin Premji Shah a/w. Snehankita Munj and Zarna Shah for the appellant.

Mr. Ram Mani Upadhyay for respondents 2 & 3.
Mr. A.S.Patil, APP for the State.

CORAM : DAMA SESHADRI NAIDU, J.

JUDGMENT RESERVED ON : 27th June 2019
JUDGMENT PRONOUNCED ON : 23rd July 2019

JUDGMENT

Introduction:

Appellant Doshi Brothers is a proprietary concern. Through its proprietor, BC Doshi, it filed a private complaint against M/s. Sai Wire Products ("the Company") and its director Mustafa Mohammadhussain Sial ("Sial"), the 2nd and 3rd respondents

respectively. Sial, as the co-signatory of the cheque, is said to be looking after the Company's day-to-day affairs.

2. Doshi, the sole proprietor, claims to have business relations with the Company. He further claims that, as part of their continued business transactions, he supplied goods to the Company and received cheques, signed by Sial and another, for the partial discharge of the Company's debt. The cheques dishonoured, Doshi filed CC No. 806/SS/2010 before the Metropolitan Magistrate's Court, Bandra, Mumbai. Eventually, on merits, the trial Court, through its judgement dated 21 August 2014, dismissed the case and acquitted the Company and Sial. Aggrieved, the proprietary concern, through Doshi as its proprietor, filed this appeal.

Submissions:

3. Shri Jatin Shah, the learned counsel for the appellant, has submitted that Doshi and the Company have had business relations for more than a decade, with a continuing account. In those business transactions, the Company acknowledged its liability and confirmed the statement of account prepared by Doshi, showing Rs.6,18,437/- as outstanding. Then the Company issued three cheques, signed by

M.M. Sial and another, on 16 January 2010, for an aggregate of Rs.6 lakh, towards partial discharge of the debt.

4. When the cheques were dishonoured, though Doshi issued a statutory notice, dated 18th February 2010, neither the Company nor Sial replied, despite their receiving the notices. To underline the authenticity of the business transaction, Shri Shah has drawn my attention to Exhibit P6 to P8 invoices and Exhibit P9 to P 11delivery challans. He has also drawn my attention to Exhibit P13 to P15-cheques to stress they were signed by two directors and neither disputed the signature.

5. Shri Shah has informed the Court that though initially Doshi filed the case against the Company and the two signatories, he could not trace the other person's whereabouts. So he maintained the prosecution only against Sial, besides the Company.

6. Shri Shah asserts that the cheques were dishonoured for want of funds. After taking me through Doshi's evidence in chief and cross, he stresses that the defence could elicit little from Doshi to detract from the merits of his claim. Then, he has also taken me to Sial's statement under Section 313 of Cr.P.C. According to him, Sial

admitted there were business transactions between the Company and Doshi and that the Company ordered steel from Doshi. His only defence, Shri Shah maintains, is that the goods were not supplied. Given the conduct of the Company and Sial's admissions, that defence, submits Shri Shah, remains untrue.

7. Finally, Shri Shah has taken me through the entire judgement to highlight, what he calls, the infirmities in the trial Court's reasoning. According to him, it has failed to consider the vital documentary evidence, besides the oral evidence, Doshi has placed on the record. He also argues that the trial Court has made sweeping observations as if Doshi had filed no documents to support his claim. In this context, Shri Shah also underlines that Doshi enjoyed statutory presumption, but the trial Court has entirely forgotten that aspect.

8. To bolster his contentions, Shri Shah has relied on a few judgments. I will refer to them only if I need a precedential prop to buttress any proposition of law.

Respondents 2 and 3:

9. To begin with, Shri Ram Mani Upadhyay, the learned counsel for the respondents 2 & 3, insists this Court should have had before it the entire lower Court record (R&P) to let him examine all the proceedings and documents. In its absence, the rights of the accused might suffer.

10. To illustrate the need of R&P, Shri Upadhyay cited two examples: first, the complainant's sworn statement under Section 200 of Cr.P.C is not part of the appeal record. In its absence, he could not verify whether there are any contradictions between that statement under Section 200 and Doshi's evidence-in-chief. Second, he has also contended that the complainant has marked no documents. According to him, though the judgement refers to the documents, neither in the chief examination nor in the cross examination were they found mentioned. Even to establish that fact, he should have access to the records.

11. Then, Shri Upadhyay argued on the merits. And his submissions can be summarised thus: that Doshi has not discharged the primary evidential burden; that the Company ordered goods, but Doshi could produce no record to show he had actually supplied

them; and that Doshi has failed to explain why he has taken cheques for Rs.6 lakh when the alleged debt is more than that. Accordingly, there is an element of doubt how Doshi secured the cheques, why he has taken three cheques instead of one, why the cheques covered only a part of the alleged debt, why the cheques were taken from three different cheque books, and why only dates on the cheques were stamped when the rest of the matter was handwritten.

12. Shri Upadhyay has also contended that Doshi has not examined his accountant who has prepared the statement of account. According to him, the respondents have effectively discharged the burden cast on them. To support his contentions, he has relied on *Sachin Food Processors v. Sanjay*[1].

13. Heard Shri Jatin Shah, the learned counsel for the appellant, and Shri Ram Mani Upadhyay, the learned counsel for the respondents.

Reasoning:

14. The dishonour of a cheque is a contractual breach. It involves civil consequences under the common law, besides the Negotiable Instruments Act and the Contract Act. But Parliament,

[1] **[]** (2016) 2 Bom CR (Cri) 343

through Section 138 of NI Act, made it a criminal offence. Thus a civil breach has been transformed into a penal offence. For this reason, the courts regard the offences under Section 138 of NI Act as quasi-criminal.

15. That said, I must add that NI Act contains certain non-obstante provisions barring Code of Criminal Procedure from applying in its entirety. If conflict occurs, the NI Act prevails. But the standards applied for bringing the accused's guilt home have not been drastically varied, save the statutory presumption under Sections 118 and 139 of the NI Act. Still the guilt must be established beyond reasonable doubt.

16. Now, the admitted facts are these: Doshi's proprietary concern, which cannot be a different legal entity from its proprietor himself, has had business relationship with the Company. (And I have used the expression "Company" to include both the respondents, that is the Company and Sial, its Director). The Company admits that it had ordered supply of goods—steel—but Doshi did not supply them. The Company has not disputed the cheques but asserted that the

Company gave those three cheques earlier as security and that Doshi misused them.

17. The Company maintains that Doshi has not discharged the primary burden the law cast on him. Doshi counters this assertion by arguing that as the cheques stood admitted, Section 139 of NI Act springs into action. And, rebuttable as the burden is, the Company has not discharged that burden. There can be no quarrel, however, about the legal proposition that the accused can discharge its statutory burden under Section 139 either directly or indirectly—that is, based on the infirmities in the prosecution's case.

18. Now, before we analyse the rival contentions, we will see how the trial Court has returned a verdict of acquittal. For to upset a verdict of acquittal, we should have compelling circumstances. And the judgment under appeal must have been perverse. Presumption of innocence is undoubtedly a human right, as was held in *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra*[2] and *Rajesh Ranjan Yada @ Pappu Yadav v. CBI through its Director*[3]**.** But the Supreme Court in *Bir Singh v. Mukesh Kumar*[4], holds that the complainant

[2] **[]** (2005) 5 SCC 294
[3] **[]** (2007) 1 SCC 70
[4] **[]** Supreme Court's Judgment, dt.06.02.2019

can establish the guilt by recourse to presumptions in law and on facts.

19. Let us examine the impugned judgment to ascertain whether it suffers from any incurable legal infirmities and perversity so in appeal we can reverse the findings and hand down a verdict of guilt. And this examination is in the backdrop of the rival submissions, too.

I. The Technical or Procedural Objections :

Does the non-availability of Record and Proceedings (R & P) affect the rights of a party to the Appeal?

20. The Company's counsel insisted that the Court should not proceed with the appeal without R & P. On the other hand, Doshi's counsel has contended that Doshi is a senior citizen who needs an early disposal of the appeal. According to him, the Company has been dragging the proceedings, despite this Court's asking it to get ready with the matter early.

21. This issue need not detain us for long. An appeal filed and the respondent notified, it is for the respondent to be ready with the matter. We can presume that, as the appeal is between the same parties, they know about the developments before the trial Court,

what proceedings were taken there, and what documents, if any, were marked and relied on. We can as well presume that the parties on either side have secured the certified copies of the trial Court's record, to prepare themselves in the appeal.

22. Usually, the appellant is expected to file in appeal the trial Court's record. If the record is voluminous, the appellant then files the pleadings and all the documents that are material for the Appellate Court to dispose of the appeal. In this context, we may examine Section 385 of Cr. PC. It deals with the procedure for hearing appeals not dismissed summarily. It requires the Appellate Court to give notice "of the time and place at which such appeal will be heard" to the appellant or his pleader; to the Public Prosecutor; to the complainant if the appeal is from a judgment of conviction in a case instituted upon complaint; and to the accused if the appeal is under section 377 or section 378. The Appellate Court should also furnish them with a copy of the grounds of appeal.

23. Then, Subsection mandates that the Appellate Court should send for the record, "if such record is not already available in that Court," and hear the parties. Of course, if the appeal is only about

the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

24. Here, the appellant-complainant has filed all the material documents, including the evidence, along with the grounds of appeal. Yet what the respondent-accused wants, as his counsel insists, is the complainant's statement under Section 200 of Cr PC. True, different High Courts have taken different views on whether it is mandatory for the Judicial Magistrate to examine the complainant under Section 200 in a case under the NI Act. But a Division Bench of this Court, in *Maharaja Developers v. Udaysingh Pratap Singh Bhonsale*[5], has held that the non-obstante clause in Section 142 of the N.I. Act does not relieve the Magistrate of his duty to examine the complainant and his witnesses on oath under Section 200 of Cr. P.C.

25. That said, does the non-availability of the R&P from the trial Court stymie the appellate proceedings? Indeed, the unavailability of a material document may prove fatal to the appeal proceedings for either party may stand prejudiced. I will confine the discussion to the document the respondent-accused wanted to have access to: the complainant's statement under Section 200 of Cr PC.

[5] **[]** 2007 (3) Crimes 550 (Bom)

26. While taking cognizance of an offence, the Magistrate examines the complaint on oath and the witnesses present if any. Then, the Magistrate reduces to writing only "the substance of such examination". This substance aids the Magistrate to form a *prima facie* opinion about the case. In other words, it is to discover the truth or otherwise of the allegations made. It is for deciding the question purely from the complainant's viewpoint, with no reference to the possible defence. Thus, the procedure under Section 200 Cr PC is non-adverserial. And what is recorded is not the complainant's verbatim statement, only the substance or gist. Therefore, it is not a piece of substantial evidence to be used to contradict or discredit the complainant.

27. That apart, let us examine the conduct of the Company and its Director, that is the respondents. Doshi filed this appeal in 2014. Soon the respondents received notice. If we examine a couple of docket orders in 2016, the respondents' intention comes to the fore:

"None appears for the respondent. By way of last opportunity to the respondent …stand over to 18.01.2016." On the next successive dates until November 2017, there was no representation.

On 7th June 2019, the Court observed that if on the next date, the respondents are not ready, the Court may take further steps. On the next date, the Court noted, "Post the matter on 25th June 2019. No further adjournment shall be granted. If the respondent's counsel does not appear on the next date, the Court will view his conduct seriously." On the next couple of dates too, the position did not improve. Then, under the compelling circumstances, the respondents advanced their arguments.

28. As a result, I hold that the Company's non-access to the "substance" under Section 200 Cr PC., does not materially affect the course of appeal, nor does it prejudice the Company.

The Admissibility of Documents:

29. The Company's counsel has argued that though Doshi has filed many documents, he has not properly marked them. The judgment contains no schedule showing the list of documents—a practice essential for the appellate courts to know what documents have been legitimately brought on record. As the Company's counsel has rightly contended, not all documents placed on record would automatically get marked or admitted.

30. To steer the case clear of this controversy, I have considered only those documents that have been mentioned in the judgment as admitted.

II. On the Merits:

(a) What is a Proprietary Concern?

31. Regrettably, the trial Court seems to have been caught in a conceptual confusion on this point. It has observed that M. C. Doshi, who deposed as P.W. 1, has no proper authorization to present the complaint and to produce the evidence "on behalf of the complainant company." It further observes that the "complainant company firm" is a proprietary firm and Doshi is its proprietor, "duly authorized by complainant firm in this regard." Then, it concludes that "there is no any as such documentary proof available on record to substantiate this fact."

32. A company is an incorporated body corporate—a legal entity on its own. A firm, that is a partnership firm, is not. But Section 141 of the NI Act makes, by legal fiction, even a firm a legal entity, on a par with a company proper. So for Section 138, there is little difference between a company and a (partnership) firm. The

explanation appended to Section 141 clarifies that (a) "company" means anybody corporate and includes a firm. By extension, a partner must be likened to a director. Though a mere association of individuals cannot be termed a firm, yet the explanation to Section 141 makes it so. Even an unregistered partnership firm—that is, an Association of Individuals—must also be treated as a firm for the offences under Section 138 of NI Act.

33. The remaining category is the "proprietary concern." A proprietary concern, I may note, is neither a company nor a firm—not even an association of individuals. It is no legal entity, either. A proprietary concern is set up by an individual; in fact, it is the individual described with a varied or fancied name, or even purely with his or her own name. If more than one person join, then it becomes a partnership firm, a limited liability partnership firm, or a company. It may even become a simple association of persons, as permitted under Section 141 of NI Act.

34. The proprietary concern, however, is an unincorporated business entity, if it were an entity at all. Its registration, if any, is for fulfilling other statutory purposes, such as licensing by a civic body or

taxing authority. Though it is usually called "the sole-proprietary concern", the expression "sole" is tautological—saying the same thing twice. There can be no more than one proprietor, after all. In this statutory backdrop, let us examine the trial Court's findings on this point: Who is the complainant?

(b) Who is the Complainant?

35. The trial Court takes note of P. W. No.2's evidence. He is the official from the payee bank, that is the complainant's banker. The witness has deposed that BC Doshi is the proprietor; he produced a copy of account opening form, too. Despite that, the trial Court concludes that Doshi has no proper "authorization" to present the complaint "on behalf of the complainant company." To repeat, in relation to a proprietary concern, its Proprietor getting authorisation does not arise. The proprietary concern and the proprietor are but one; there is no dichotomy.

36. Here curiously, perhaps adding to the trial Court's discomfiture, the proprietor has sued in the assumed name; that is, in the proprietary concern's name. As it is not a legal entity, no proceedings could be maintained in its name. It is, actually, the

proprietor who should have sued or who is deemed to have sued here. First, this issue has never been raised in the trial Court, so it passed *sub silentio*. Second, it is a curable defect; therefore, no need to make adjudicatory mountains out of procedural molehills.

Were the Cheques given as Security?

37. The Company and its Director contend that the cheques were given as security, but Doshi misused them. To justify this assertion, the Company has argued these aspects: (a) Doshi has failed to explain why he has taken cheques for Rs.6 lakh when the alleged debt is more than that. (b) Doshi has claimed to have taken the cheques on the same day; then, he could have taken one cheque, instead of three. (c) Doshi has taken all the three cheques on the same day, they must have been in a series, but they are from three different series. And (d) though the cheques were handwritten, the dates were stamped. So it wanted the Court to conclude that the cheques were given as security.

38. Admittedly, the Company and Doshi have business relations for many years; Doshi supplies steel to the Company. They have a continuing account. In other words, the transactions are not

singular or watertight. Based on the Company's orders, Doshi keeps supplying; periodically they draw up accounts showing the amount due; and, on demand, the Company continues to pay the amounts for the supplies it has received. There can be no individually corresponding transactions of supply and payment.

39. To illustrate that there had been business transactions during the relevant period, Doshi produced before the trial Court (a) the copies of invoices No. 161/08/-09, No. 167/08-09 and No. 014/09-10, as Exts. P-6 to P-8. Then, he has also produced the copies of Challans No. 161/08/-09, No. 167/08-09 and 014/09-10, as Exts. P-9 to P-11. And of much significance is the statement of account with a heading "confirmation of accounts" for the period from 01.04.2009 to 15.01.2010, drawn up by Doshi and acknowledged by the Company. It was marked as Ext. P-12. On all these documents, Sial signed as the Director, under the Company's seal. These documents have not been disputed. The Company's only defence in the face of these admitted documents is that Doshi did not supply the goods. We will come to that later.

40. We have already seen that the transactions between the parties were continuous and the accounts were drawn up periodically. The statement of account (Ext.P12) begins with an opening balance of Rs.7,02,753/- and with a closing balance of Rs.13,77,046/-. Of this amount, Doshi wanted the Company to partially clear the dues. So the cheques.

41. Then, why did Doshi not take a single cheque? But it is not a question of taking; it is a question of giving. It is the Company that gave the cheques. For whatever operational convenience, the Company might have given three cheques, instead of one.

42. Next comes another question: Whey didn't the cheque cover the total liability? The statement of account reveals the outstanding amount as Rs.13,77,046/-, and this document has not been disputed. It has begun with an opening balance of Rs.7,02,753/-. The Company always enjoyed, it seems, a credit facility, and it could keep, perhaps, a margin of about seven lakhs. So of Rs.13,77,046/-, it issued cheques for six lakhs, again keeping a margin of about seven lakhs again. And a cheque can always be given, as Section 139 declares, for discharging a debt in full or in part.

43. The next question in this context is, why did the cheques were dated with a rubber-stamp, though they were handwritten? The answer is not far to seek. It is a matter of practice; it is a matter of convenience. In business transactions, the dates are certain and repetitive, but not the amounts, which have to be given both in words and figures. So a preformatted rubber stamp is the last thing any business could employ. In other words, it is unusual, even impossible, to find a business concern using rubber-stamps to write words and figures on a cheque. It may use a typewriter or a printer, though. The date-stamp, on the other hand, is a devise that will have days, months, and years rolling circularly. So, stamping dates on cheques is a matter of convenience. And such stamping cannot affect the cheques' validity. By the same reckoning, a date-stamped cheque should not be fatal to the complainant's case.

44. Now comes the last question: If the cheques had been given on the same day, why did Doshi take them from three different series? First, no law prohibits such a course—that is, a debtor drawing multiple cheques from different cheque-book series, to be given to a payee on the same day. Let us think on the converse. A person gives,

say, three cheques, drawn on the same day. But the cheques were not from the same cheque book. Unwary or impressed by the fact that there is no legal prohibition, the creditor accepts them. Once they are dishonoured, in the ensuing litigation, is it not the surest way for the accused to set up a defence of variation in the cheque series and get away? Improbable the conduct may be, unusual the practice may be, but not impossible. And in the least illegal.

45. The Company has insisted, as the trial Court has observed, that there is no concrete and reliable evidence on Doshi's part about who has signed these cheques, who has filled the contents of these cheques, or who delivered these cheques to Doshi. In that context, the trial Court has found that "neither in the complaint, nor in the statutory demand notice, and nor in its evidence," Doshi pleaded when the Company issued the cheques, or when "the amount of the present subject cheques had become due and payable".

46. Who signed the cheques, who filled the contents, and who delivered the cheques are all questions of statutory presumption, and the answers are self-evident. The trial Court's skepticism about when the cheques were issued and when the amount became due, I am

afraid, is ill-founded. A cheque is presumed to have been drawn on the date it bears, and it becomes due on the same date. There can be no cheque bearing one date and becoming payable on some other date. If at all a cheque is post-dated, it remains a bearer instrument until that date arrives.

47. So, in the absence of any countervailing evidence placed by the Company, we must reject its contention that it had given the cheques as security. As the cheques were admitted having been issued, the Company must have discharged the twin burden: that the cheques were given as security, and that they did not receive the goods. About the Company's assertion that it had given the cheques to Doshi as security, it has placed no evidence. Nor has it elicited anything from Doshi in the cross examination. In fact, issuing cheques as security and not receiving the goods are two different things; one cannot disprove the other. Giving cheques as security, to be explicit, is unconnected with not receiving the goods.

Have the Goods not been Supplied?

48. The Company has admitted that it had ordered steel, but Doshi did not supply the goods. In that context, the trial Court has

concluded that Doshi was under a statutory obligation to prove that the Company issued the cheques to discharge "the existing legally enforceable debt/ liability", but he failed to discharge that burden.

(a) The Presumptions:

49. To answer this contention, we must examine the statutory position under the NI Act, especially Sections 118 and 139. Under Section 118, the presumptions cover (a) consideration, (b) the date, (c) the time of acceptance, (d) the time of transfer, (e) the order of indorsements, (f) the stamps used, and (g) the holder in due course. For our purpose, (a) (b) are important. Until the contrary is proved, there shall be a presumption (a) that "every negotiable instrument was made or drawn for consideration." And as to the date, the presumption must be (b) that every negotiable instrument bearing a date was made or drawn on such date.

50. Now we will examine Section 139 of the NI Act. And the provision reads:

> "139. Presumption in favour of holder: It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

51. True, the presumptions under Section 118 or under Section 139 are rebuttable. Section 139 allows a presumption that the cheque referred to in Section 138 was given to discharge the debt in whole or in part. But the question is whether the debt or other liability under Section 139 is presumed to be "a legally enforceable debt."

52. In *Krishna Janardhan Bhat v. Dattatraya G. Hegde*[6], a two-Judge Bench of the Supreme Court has analysed Section 138 of the NI Act and found three ingredients: "(i) that there is a legally enforceable debt; (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and (iii) that the cheque so issued had been returned due to insufficiency of funds." It has, then, held that existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability. It has also held that the prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof to prove an accused's defence is 'preponderance of probabilities.'

[6] [] [(2008) 4 SCC 54

53. This proposition—that the presumption under Section 139 does not cover legally enforceable debt—was tested in *Rangappa v. Sri Mohan*[7], by a three-Judge Bench. It has held that "the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability." To that extent, *Rangappa* disagreed with *Krishna Janardhan Bhat*. But it has accepted this is a rebuttable presumption and that it is open to the accused to raise a defence, contesting that presumption. *Rangappa* has, in that context, observed:

> Section 139 of the Act is an example of a reverse onus clause that has been included to further the legislative objective of improving the credibility of negotiable instruments. . . However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof.

54. But *Rangappa* endorses *Krishna Janardhan Bhat* on the question of rebuttal. It holds that in the absence of compelling justifications, reverse onus clauses usually impose an evidentiary

[7] **[]** (2010) 11 SCC 441

burden and not a persuasive burden. *Rangappa*, in fact, quotes *Krishna Janardahn Bhat* with approval on this point: whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove the accused's defence is `preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies.

55. Therefore, if the accused can raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution will fail. So the accused can rely on the materials submitted by the complainant to raise such a defence and it is conceivable that sometimes the accused may not need to adduce evidence of his/her own.

56. The trial Court has accepted that the Company admitted the “issuance of subject cheques” and the “signature of the accused on these cheques.” Then, it went on to observe that notably the complainant has produced no document to prove that the alleged goods were sold and delivered to the Company. So “the defence taken

by the accused persons appears to be natural and probable one." It has finally held that Doshi, in his evidence, gave the details of the alleged transaction. Yet "neither any Register nor any book of accounts is produced on recorded to show the details as such the date of delivery of goods, quality, quantity and rate of the said goods, the mode of delivery of these gods etc."

57. I am afraid the trial Court has remained oblivious of the statutory presumptions under Sections 118 and 139 of the NI Act. The Company has led no direct evidence, nor does, of course, law compel it to. Then, to rebut, it must have exposed the flaws in the complainant's case. Has it done so?

58. To put this issue in perspective, first, let me observe that after admitting that it ordered steel, the Company has never denied its liability on the ground that it had not received the goods. The best, if not the earliest, opportunity it had was when it received the statutory notice. It remained quiet. Second, the Company has not given the cheques transaction-wise. It has a running account. It received the statement of account, checked it, and accepted it. Third, keeping aside everything else, Doshi can latch on to the statutory presumption

under Section 139 that the cheques were given for the discharge of a legally enforceable debt. It must have been the Company's turn to rebut it. Wishing away a presumption is no rebuttal; neither is a bald denial.

59. The trial Court's observations that Doshi has not produced the records to prove that it had supplied the goods and that he has not examined the accountant carry no conviction. If Doshi had to prove the whole transaction from the scratch merely because the Company denied having received the goods, the statutory presumption pales into oblivion. And Section 139 of NI Act stands entirely ignored.

Collateral Factors:

60. Even otherwise, from the records it is evident that getting the cheques dishonoured is nothing new for the Company *vis-à-vis* Doshi. In the statement of account, there were instances recorded that the Company gave cheques but did not honour them. To illustrate, on 12th June 2009, the Company's cheque was returned unpaid; so was on 23rd September 2009. In fact, the banker's endorsement reads "don't present again," an endorsement usually reserved for its customers whose dishonouring of cheques is repetitive.

The Last Limb:

61. The Company has heavily relied on *Sachin Food Processor*. In that case, the complaint alleged that the respondent purchased broiler chicken and issued a cheque for discharging his liability. The Trial Court disbelieved the complainant's version and acquitted the respondent. On appeal, this Court has noted on facts that in his cross examination, the complainant has "admitted that he has not supplied broiler chicken to respondent" on the material day. He has further admitted that the "dates of supply of broiler chicken mentioned in the complaint are incorrect dates." In his cross examination, the complainant has also admitted that he has not supplied the goods to respondent on other dates, too. He did admit that he had "not placed any document about demand of broiler chicken by the respondent from him"

62. Thus, essentially, on the facts, this Court in *Sachin Food Processor* has confirmed the respondent's acquittal. I am afraid that case can have no precedential impact on this case.

Result:

63. The appeal is allowed; the trial Court's Judgment, dt. 21st August 2014, is set aside. Consequently, the respondents 1 & 2 are convicted under Section 138 of the Act.

64.1 Mustafa Mohammadihusain Sial, the accused No.2, is hereby sentenced under Section 138 of the Negotiable Instruments Act to undergo S.I. for one year;

64.2 Both M/s. Sial Wire Products Pvt. Ltd., and Mustafa Mohammadihusain Sial are directed to pay, jointly and severally, compensation of Rs.10,00,000/- to the complainant in thirty days after this judgment is uploaded. In default, Mustafa Mohammadihusain Sial shall suffer simple imprisonment for three months, in addition to the substantive sentence, in view of Section 357 (3) of Cr PC.

64.3 The bail bonds of the accused are surrendered.

64.4 The period of detention, if any, undergone by Mustafa Mohammadihusain Sial shall be set off against the sentence of imprisonment, under Section 428 of Cr PC.

64.5 The copy of the judgment be provided to the accused free cost.

(DAMA SESHADRI NAIDU, J)

L.S. Panjwani, P.S.